# IN THE
# SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1973

No. _____

RALPH GRIFFIN and ROBERT E. KEELE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION and LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association,

Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## TOPICAL INDEX


| | Page |
|---|---|
| Table of Authorities | iii |
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| A. PROCEEDINGS BELOW | 3 |
| B. STATEMENT OF FACTS | 5 |
| ARGUMENT | 8 |
| I WHETHER IT IS CONSTITUTIONALLY PROPER UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PRESCRIBE THE STATUTE OF LIMITATIONS OF THE STATE OF CALIFORNIA TO §1981 OF TITLE 42 OF THE UNITED STATES CODE. | 8 |

II WHETHER AN ACTION UNDER THE 1964 CIVIL RIGHTS ACT REQUIRES FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION IF THE EVENTS OCCURRED MORE THAN NINETY (90) DAYS PRIOR TO THE ENACTMENT OF THE ACT. 11

III WHETHER A DISCRIMINATORY ACT OCCURRING IN 1946 WHOSE EFFECTS WERE NOT APPARENT UNTIL 1969 WOULD BE BARRED BY EITHER LACHES OR A STATUTE OF LIMITATIONS. 12

CONCLUSION 14

APPENDIX A

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Holmberg v. Armbrecht, 327 U.S. 392, 66 Supreme Court 582 | 9 |
| Jones v. Alfred H. Mayer Company, 392 U.S. 409, 88 Supreme Court 2186 | 8 |
| Love v. Pullman, 404 U.S. 522, 92 Supreme Court 616 | 12 |
| **Constitutions** | |
| Declaration of Rights, State of California, Article 1, Section 1 | 12 |
| United States Constitution, Fourteenth Amendment | 2, 8, 9 |
| **Rule** | |
| Federal Rules of Civil Procedure, Rule 8(a)(2) | 4 |
| **Statutes** | |
| California Evidence Code §663 | 13 |
| Title XIV, U.S.C.A., §§1981 and 1982 | 3 |

28 U.S.C. 1254-1 2

Title 42, U.S.C. §1981 2, 8, 9

Title 42, U.S.C. §2000e-5(e) 11

Textbook

18 Cal. Jur. 2d p. 413 13

Miscellaneous

Executive Order No. 9346
(Franklin D. Roosevelt) May 27, 1943 12

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an order granting summary judgment in favor of respondents herein.

## OPINION BELOW

The opinion of the Court of Appeals was rendered on April 25, 1973, No. 72-2117. The opinion is set forth in Appendix A.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254-1.

## QUESTIONS PRESENTED

1. Whether it is constitutionally proper under the Fourteenth Amendment to the Constitution of the United States to prescribe the Statute of Limitations of the State of California to §1981 of Title 42 of the United States Code.

2. Whether an action under the 1964 Civil Rights Act requires filing with the Equal Employment Opportunities Commission if the events occurred more than ninety (90) days prior to the enactment of the act.

3. Whether a discriminatory act occurring in 1946 whose effects were not

apparent until 1969 would be barred by either laches or a statute of limitations.

## STATEMENT OF THE CASE

### A. PROCEEDINGS BELOW

Petitioners are longshoremen, and prior to retirement, were members of Local 13 ILWU, one of the respondents herein.

On September 13, 1971, petitioners filed suit in the United States District Court against PACIFIC MARITIME ASSOCIATION and LOCAL 13 of INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, for conspiracy under the Federal Civil Rights Act (Sections 1981 and 1982, Title XIV, USCA), for Declaratory Relief and for an injunction. Petitioners pray for declaration that the acts of respondents in de-registering them and in terminating them without notice, constituted an unlawful conspiracy, and that petitioners were unlawfully de-registered as members of Local 13; for a permanent injunction enjoining respondents from continuing their acts of de-registration and depriving them of their pension rights and automation pay and for compensatory and punitive damages.

On February 12, 1972, respondent Local 13 filed a Motion to Strike the Complaint and various allegations therein which ask for punitive damages and which asserted the Complaint as a class action, and further, for failure to comply with Rule 8(a) (2) of the Federal Rules of Civil Procedure.

On February 3, 1972, respondent PACIFIC MARITIME ASSOCIATION filed a Motion for Summary Judgment on the ground that the facts show that there is no theory on which petitioners can maintain this action. Subsequently, respondent Local 13 filed a similar Motion for Summary Judgment based substantially upon the same grounds as those asserted by respondent PACIFIC MARITIME ASSOCIATION.

The Motions were argued before the Honorable Jesse W. Curtis, District Judge, on March 27, 1972, and he granted the Defendants' Motion for Summary Judgment. Findings of Fact and Conclusions of Law were filed by the Court on April 6, 1972, and the Judgment was filed on the same date.

On May 4, 1972, petitioners filed a Notice of Appeal, appealing from the said Judgment which was entered on April 7, 1972.

## B. STATEMENT OF FACTS

On April 16, 1946, respondent Local 13 terminated petitioners and others similarly situated who had been working as longshoremen and who were members of Local 13, all of whom were initiated on or after July 5, 1945. Petitioners thereafter refused the right to participate in any union affairs. Petitioners became members of Local 13 before April 16, 1946, and after July 5, 1945. They were fired without notice. There was no provision in the Union Constitution or By-Laws for correction of this Union act (Record on Appeal p. 81).

The Master Agreement then in effect between the Union and the Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of California, Waterfront Employers Association of Portland and the Waterfront Employers Association of Washington (all of whom were predecessors of respondent PACIFIC MARITIME ASSOCIATION) provided, inter lia, that preference of employment shall be given to Union members when available -- preference in making additions to the registration lists, and in dispatching men to jobs. The Agreement contained an anti-discrimination clause (Record on Appeal pp. 81-82).

Petitioners have claimed that their membership in Local 13 was terminated solely

because of their race, which was then a violation of the Master Agreement and since 1964 has been a violation of the Civil Rights Act; that their damages did not arise until they retired from employment, and that their cause of action under said Civil Rights Act arose under and by virtue of the Collective Bargaining Agreement of 1966-1971 between PACIFIC MARITIME ASSOCIATION and the INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, Local 13 (Record on Appeal p. 82).

In 1948 petitioner, RALPH GRIFFIN, filed suit against Local 13 in the Los Angeles Superior Court. A Fourth Amended Complaint was filed on May 8, 1950. He and twenty-seven other longshoremen claimed that they were fired because of their color and race. A Demurrer was sustained to the Fourth Amended Complaint, and on appeal the District Court of Appeals upheld the Demurrer because of laches and because it was barred by the California Statute of Limitations (Record on Appeal pp. 35-36).

On May 5, 1965, thirty-three men filed a grievance Petition with INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION - PACIFIC MARITIME ASSOCIATION Joint Labor Relations Committee. Petitioners Griffin and Keele did not sign said Petition and were not parties thereto (Record on Appeal p. 36).

The Petition raised issues similar to the Griffin 1948 lawsuit and on March 11, 1971, the arbitrator decided against the Petitioners, stating that plaintiff's claims were barred by the passage of time (Defendant's Exhibit 4 - Griffin deposition).

The respondents herein claim, by way of defense, that because of the foregoing events, petitioners cannot prevail on any theory, raising the defenses of Statute of Limitations, laches, collateral attack, estoppel, election of remedies and jurisdiction (Record on Appeal p. 25). Petitioners have consistently maintained that the actions of the respondents constituted a conspiracy to deprive them of their jobs because of their race and that Local 13 wished to maintain itself as a "lilywhite" union (Griffin Affidavit - Record on Appeal p. 90).

## ARGUMENT

### I

### WHETHER IT IS CONSTITUTIONALLY PROPER UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PRESCRIBE THE STATUTE OF LIMITATIONS OF THE STATE OF CALIFORNIA TO §1981 OF TITLE 42 OF THE UNITED STATES CODE.

The Civil Rights Acts of 1866 and the Fourteenth Amendment to the Constitution of the United States following the said Act were enacted to protect former slaves from actions of States and persons acting under color of State law denegating their rights as free and equal citizens of the United States and of the State in which they dwell. Section 1981 of Title 42 of the United States Code codified the intent of Congress in the passage of legislation following long debate and analysis of the problems involving the newly freed slaves and emphasized that their rights and progress in establishing these rights may not be impeded by laws, statutes, ordinances, regulations or customs of the states. In the case of Jones v. Alfred H. Mayer Company, 392 U.S. 409, 88 Supreme Court 2186. To the Congress that passed the Civil Rights of 1866, it was clear that the right to do these things might

be infringed, not only by State and local law, but also by custom or prejudice. Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some three years after the ratification of the Fourteenth Amendment. It is quite true that some members of Congress supported the Fourteenth Amendment in order to eliminate doubt as to the Constitutional validity of the Civil Rights Act as applied to the states. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re-adoption of the Civil Rights Act were meant somehow to limit its application to State Action. The Federal Courts have analogized to State statutes of limitations in some cases where Congress was silent as to such limitation in enacting Federal statutes. It is clear, however, that a study of the history of Section 1981 of Title 42, United States Code, would indicate that the protections thereunder were meant to be broad and basic to the rights of the Negro citizen. In the case of Holmberg v. Armbrecht, 327 U.S. 392, 66 Supreme Court 582, the Court stated:

> "Traditionally and for good reasons Statutes of Limitations are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention. Namely, whether the plaintiff has inexcusably

> slept on his rights so as to make a decree against the defendant unfair."
>
> "It would be too incongruous to define a Federal right within the bare terms of a State statute of limitations."

Here, in effect, we have a fraudulent and unconstitutional act perpetrated upon the petitioners by respondents wherein they eliminated practically every Negro longshoreman from the union by the process of taking away their membership books in 1946. Although some years later many, or most, of them were again able to obtain books, this was too late to defend the rights that they would and should have had had their membership books not been unconstitutionally taken from them, as, under the 1966-1971 collective bargaining agreement, they would have obtained approximately $13,000.00 automation pay, in addition to a higher pension, had the membership time dated back to the 1946 period. Therefore, the true effect of the fraud upon them was not known until the effect of the 1966-1971 contract was fully realized.

## II

## WHETHER AN ACTION UNDER THE 1964 CIVIL RIGHTS ACT REQUIRES FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION IF THE EVENTS OCCURRED MORE THAN NINETY (90) DAYS PRIOR TO THE ENACTMENT OF THE ACT.

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It is true that no complaint was filed with the EEOC as required by 42 U.S.C. Section 2000e-5(e), and while it is true that the alleged discriminatory act first took place in 1946 and is a continuing act, petitioners' damages became a reality and became fixed under and by virtue of the 1966-1971 contract. Petitioners sought relief initially after the 1948 Superior Court litigation by way of arbitration and during this period sought no relief under the 1964 Civil Rights Act. While attempting to exhaust administrative remedies, the 90-day period within which to file with the EEOC expired. To file would have been a futile act. Petitioners were caught in a legal dilemma -- if they filed with EEOC, they would have been faced, in all likelihood, with a defense at law of not having resorted to administrative relief, and by pursuing administrative relief the 90 day period expires. It is petitioners' contention that the right to earn a livelihood is a property right guaranteed by the Constitution of the State of California which cannot be taken away by legislative action.

Love v. Pullman,
404 U.S. 522, 92 Supreme Court 616;

Declaration of Rights, State of California, Article 1, Section 1;

Executive Order No. 9346 (Franklin D. Roosevelt) May 27, 1943.

Here the respondents had ample notice of the Complaints of petitioners and therefore were not prejudiced by the failure to file. The same claim of the respondents would have been entered that the act originated in 1946, at which time the EEOC did not exist.

III

WHETHER A DISCRIMINATORY ACT OCCURRING IN 1946 WHOSE EFFECTS WERE NOT APPARENT UNTIL 1969 WOULD BE BARRED BY EITHER LACHES OR A STATUTE OF LIMITATIONS.

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Respondents rely upon the defense of the California Statute of Limitations. In this they are supported in the opinion of the Court of Appeals for the Ninth Circuit. They claim that the cause of action in this Complaint arose back in 1946 when petitioners were de-registered (Record on Appeal pp. 18-24). While it is true that the act of de-registration occurred in

1946, petitioners' actions are fastened on the 1966-1971 contract and in this respect assert that they have a right to rely upon the principle of equitable estoppel, i.e., that respondents should not be permitted to plead the Statute of Limitations because petitioners' rights to vacation pay, seniority and automation pay and their retirement thereto were ascertainable only after 20-25 years continuous service in the industry put in by them. It is only at that time that any man knows how much seniority he has. Respondent PACIFIC MARITIME ASSOCIATION'S actions and assertions, in failing to give the petitioners credit for the 1946-1949 layoffs, are now asserting a right fixed under the 1966-1971 contract (petitioners' Exhibit "A" -- Record on Appeal p. 88). Estoppel essentially is a right arising from an act, admission or conduct which has induced a change of position in accordance with a real or apparent intention of the party against whom the estoppel is asserted, 18 Cal. Jur. 2d p. 413.

California Evidence Code, Section 663, provides that whenever a party has, by his own statement or conduct, intentionally and deliberately lead another to believe a particular thing is true and to act upon such believ, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Respondents, due to their wrongful acts in failing to grant petitioners full seniority rights dating back to the pre-1946 period, have

caused a series of events to flow from their wrongful actions, ultimately resulting in the diminished pensions and automation pay, the effect of which was not, of course, ascertainable until the 1966-1971 contracts. They should be estopped from taking advantage of the Statute of Limitations which in any event is not provided for in Section 1981 and the history of the statute indicates that Congress did not intend there to be any limitation upon the rights of former slaves or their descendants to take full advantage of the new freedoms contained therein.

## CONCLUSION

For the reasons urged above, petitioners pray that a Writ of Certiorari should be issued to review the decision below.

Respectfully submitted,

SELWYN, CAPALBO & MORSE

By: Herbert E. Selwyn

Attorneys for Petitioners

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RALPH GRIFFIN and ROBERT E. KEELE,
*Appellants,*

vs.

PACIFIC MARITIME ASSOCIATION and LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
*Appellees.*

No. 72-2117
OPINION

[April 25, 1973]

Appeal from the United States District Court
for the Central District of California

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Before: MERRILL, ELY, and WRIGHT, Circuit Judges.

PER CURIAM:

A group of longshoremen appeal from an order granting summary judgment in favor of their union and certain employers.

The longshoremen complain that in 1946, they were "deregistered" by the union and prevented from pursuing their trade until, several years later, they were allowed to reregister. They alleged that the 1946 layoff was racially motivated and contend that the blacks and Mexican-Americans who were deregistered are entitled to receive credit (towards seniority and vacation, automation and pension pay) for the periods during which they did not work, 1946 to 1948-51.

On multiple grounds the District Court held that it was not required to reach the merits of the claim. We agree with the District Court that the action was barred by reason of the passage of time and the appellants' failure to exhaust another remedy. We make no judgment on the merits of the claim. Nor do we

announce an opinion as to the correctness of the other grounds upon which the District Court rested its decisions.

The longshoremen alleged jurisdiction by reason of both the 1866 Civil Rights Act (42 U.S.C. §§ 1981, 1985) and the 1964 Civil Rights Act (42 U.S.C. § 2000-e).

### *The 1866 Act*

The pertinent provisions of the 1866 Civil Rights Act prescribe no period of limitations; hence, the most nearly analogous state period of limitations applies. *See, e.g., United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 763 (3d Cir. 1971).

The most nearly applicable California statutes prescribe limitation periods not exceeding four years. *See* Cal. Code Civ. Pro. §§ 337, 338(1) (West 1972 Supp.) & 343 (West 1954). If any one of these statutes governs the longshoremen's § 1981 and § 1985 actions, the filing of the complaint was decidedly tardy.

The longshoremen advance two reasons why the statute of limitations should not be held to have commenced to run from 1946 or thereabouts.[1] First, they argue that the pension and fringe benefits were not fully ascertainable until sometime later, and they contend that their cause of action resides in their 1966-71 contract. We recognize that there may be cases in which a legal wrong has no significantly compensable consequences until the occurrence of a subsequent event. But we need not now decide whether, in such instances, the period of limitations should be considered to commence from the date of that event. Here, the perceivable effects of the alleged wrong were substantial at the outset. In 1948, one of the appellants in this case instituted suit in the California courts, seeking to regain union membership and employment. That suit presented the precise central issue that is now presented here and was decided adversely to the appellant Griffin. *Griffin v. International Longshoremen's and Warehousemen's Union*, 109 Cal. App. 2d 823 (1952). And, in 1965, 33 long-

[1]The suggestion that appellees were estopped from asserting the statute of limitations as a defense has no merit whatsoever.

shoremen filed a grievance based on their 1946 deregistration and unsuccessfully resorted to arbitration.

Second, the appealing longshoremen contend that by refusing to credit them with the years lost after 1946, appellees are now committing a discriminatory act. We are not unmindful of certain cases wherein the theory of continuing discrimination has been upheld. *See, e.g., Love v. Pullman Co.*, 404 U.S. 522, 524 n.3 (1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969). A layoff, by itself, however, is not such a continuing act. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1211 (1971). Furthermore, in the present case, the only manner in which the appellants could have possibly established their claim was by evidence as to what motivated the 1946 act of deregistration and the subsequent, although short-lived, refusal to allow reregistration.[2] In these circumstances, the District Court properly held that the claims under 42 U.S.C. §§ 1981 and 1985 were barred by reason of the lengthy lapse of time.

*The 1964 Act*

Unlike the 1866 Act, Title VII of the 1964 Civil Rights Act contains provisions that effectively operate to create a limitations period. An aggrieved party may sue in the District Court only if he has first filed charges with the Equal Employment Opportunity Commission (EEOC) within 90 days from the occurrence of the alleged violation, and the suit must be filed within thirty days from receipt of a notice of failure of conciliation from the EEOC. 42 U.S.C. § 2000e-5(a)&(d).

When a state has prohibited the unlawful practice alleged and has provided an agency "to grant or seek relief," additional administrative recourse is a prerequisite to private suit. The state

[2]On the face of it, denial of fringe benefits under the 1966-71 contract is a racially neutral act. At least half of the longshoremen deregistered in 1946 were Caucasian, and all had lower seniority than those not deregistered. There is no claim that the deregistered men have been the victims of discrimination since their reregistration, except inasmuch as they lost credit for their years outside the union.

agency must be notified, and the charge with the EEOC must be filed no later than thirty days after the state investigation is completed.[3] 42 U.S.C. § 2000e-5(b)&(d). *See Love v. Pullman, supra.*

California has established the remedies contemplated in § 2000e-5(b). *See* California Fair Employment Practice Act, Cal. Labor Code §§ 1410 et seq. (West 1971).

The appellants have never filed charges with the state agency or with the federal commission. They explain their failure to have done so on the theory that exhaustion of these remedies would have been futile because these agencies would merely have required them to seek arbitration. In advancing this argument, the appellants misconceive the role of the EEOC.[4] Moreover, even after their unsuccessful recourse to arbitration, the longshoremen did not pursue the administrative remedies specified in Title VII.[5] Having failed to comply with the requirements of 42 U.S.C. § 2000e-5(a)&(b), the appellants may not, at this late date, maintain action under the Civil Rights Act of 1964.

AFFIRMED.

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[3]Title VII does not specify how long a person may delay the filing of charges with the state agency. In California, one is allowed a period of one year from the occurrence of the allegedly unlawful act within which to file his claim with the state commission. Cal. Labor Code § 1422 (West 1971).

[4]There is no jurisdictional bar to invoking Title VII remedies and the arbitration process independently. *See Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311-14 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714-15 (7th Cir. 1969). *But see Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972). And our court has held that there is no requirement that *all* conceivable state remedies be exhausted prior to the institution of a Title VII suit. *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028, 1031 (9th Cir. 1970).

[5]*Cf. Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970).

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-27-73—480

## SUBJECT INDEX


| | Page |
|---|---|
| Statement of the Case | 1 |
| Questions Presented | 3 |
| Reasons for Denying the Writ | 4 |
| The Decision Below Is Not in Conflict With Prior Decision of Any Court | 4 |
| A. The Period of Limitations for Conduct Within the Scope of the Civil Rights Act of 1866 Has Always Been the Most Nearly Applicable State Statute of Limitations | 4 |
| B. The Title VII Claim Was Properly Dismissed as None of the Statutory Prerequisites Were Followed | 7 |
| Conclusion | 9 |


---

## INDEX TO APPENDICES


| | |
|---|---|
| Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit | App. p. 1 |
| Appendix B. Findings of Fact and Conclusions of Law of the United States District Court, Central District of California | 6 |

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Boudreaux v. Baton Rouge Marine Co. (5th Cir. 1971), 437 F.2d 1011 | 5 |
| Bowe v. Colgate-Palmolive Co. (7th Cir. 1969), 416 F.2d 711 | 8 |
| Campbell v. Haverhill (1895), 155 U.S. 610 | 4 |
| Chevron Oil Co. v. Huson (1971), 404 U.S. 97 | 4 |
| Green v. McDonnell-Douglas Corp. (8th Cir. 1972), 463 F.2d 337, modified on other grounds, .... U.S. ...., 36 L.Ed.2d 668 (1973) | 5 |
| Griffin v. International Longshoremen's and Warehousemen's Union (1952), 109 Cal.App.2d 823 | 3 |
| Holmberg v. Armbrecht (1945), 327 U.S. 392 | 5, 6 |
| Kennedy v. Wheeling Pittsburgh Steel Corp. (4th Cir. 1972), .... F.2d ...., 81 RRM 2349 | 7 |
| Love v. Pullman Co. (1972), 404 U.S. 522 | 8 |
| Marnin v. Zampella (3d Cir. 1972), 456 F.2d 1097, cert. den., 406 U.S. 960 | 6 |
| Newman v. Avco (5th Cir. 1971), 451 F.2d 743 | 8 |
| O'Sullivan v. Felix (1914), 233 U.S. 318 | 6 |
| Page v. Curtis-Wright Corp. (D.N.J. 1971), 332 F.Supp. 1060 | 5 |
| United Automobile Workers v. Hoosier Cardinal Corp. (1966), 383 U.S. 696 | 4 |
| United States v. Georgia Power Co. (5th Cir. 1973), 474 F.2d 906 | 6 |
| Waters v. Wisconsin Steel Works (7th Cir. 1970), 427 F.2d 476, cert. den., 400 U.S. 911 | 5 |
| Young v. International Tel. & Tel. Co. (3d Cir. 1971), 438 F.2d 757 | 5 |

| Statutes | Page |
|---|---|
| California Labor Code, Sec. 1410 | 7 |
| United States Code, Title 42, Sec. 1981 ..... 2, 3, 4, | 5 |
| United States Code, Title 42, Sec. 1983 | 6 |
| United States Code, Title 42, Sec. 1985 ..... 2, | 3 |
| United States Code, Title 42, Sec. 2000e | 7 |
| United States Code, Title 42, Sec. 2000e-2 | 2 |
| United States Code, Title 42, Sec. 2000e-5 | 7 |

Textbook

Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harvard Law Review (1971), pp. 1109, 1211 ..... 6, 7

IN THE

# Supreme Court of the United States

October Term, 1973
No. 73-159

RALPH GRIFFIN, *et al.*,

*Petitioners,*

*vs.*

PACIFIC MARITIME ASSOCIATION, *et al.*,

*Respondents.*

**Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Statement of the Case.

Respondent Pacific Maritime Association (PMA) is a multi-employer association of terminal operators, stevedore companies, and steamship lines who operate along the entire West Coast and it has the function of negotiating and entering into collective bargaining agreements with the International Longshoremen's and Warehousemen's Union (ILWU) and its various locals, including Local 13 which is the other Respondent in this case. [Finding 3.][1] There has been a collective bargaining relationship with Local 13 since before World War II and PMA and Local 13 jointly operate a Dispatch Hall from which longshoremen are

[1]The relevant Findings of Fact of the trial court are reprinted in Appendix B. References to the opinion of the Court of Appeals (attached as Appendix A) are shown as (A-page no.).

dispatched on a daily or job basis to various locations in the Los Angeles-Long Beach Harbor area.

The events giving rise to this litigation occurred back in 1946 when approximately 500 men who were lowest in seniority were laid off or, in parlance of the longshore trade, "deregistered". [Finding 2.] At least half of the group were Caucasian. [A-3, Finding 2.] Petitioners, Ralph Griffin and Robert Keele, who claim to represent a class of approximately 25 black and Mexican-American men, were among the group that was deregistered and assert that this act was racially discriminatory conduct against them. Subsequent to 1946 the Petitioners were permitted to "reregister" (Mr. Keele in 1950, Mr. Griffin in 1963[2], and the "class" in the 1948-51 period) and thus once again worked steadily as longshoremen under the PMA-ILWU collective bargaining agreement. [Finding 1.]

Petitioners now claim that under 42 U.S.C. §§1981, 1985 and 2000e-2 they are entitled to receive credit under the 1966-1971 collective bargaining agreement (towards vacation, automation and pension benefits) for the periods they did not work, generally speaking, 1946-1948-51. (There is no claim of any discriminatory conduct against them since their reregistration, nor that any Caucasians deregistered in 1946 are now receiving credit for that period.) Their suit demanding such relief was filed on September 13, 1971 or more than 25 years since the initial act of deregistration. Moreover, it was filed more than 13 years since the time when the effects of the loss of credit on vacations, *etc.* first became *admittedly* perceivable [Finding 7] and 6

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[2]Mr. Griffin was offered reregistration in 1949 but declined at that time. [Finding 1.]

years since the Petitioners participated in grievance-arbitration proceedings raising the *same* contentions. [Findings 8 and 9.][3] Furthermore, one of the Petitioners (Ralph Griffin) even filed suit in 1948 on behalf of himself and 27 others claiming that the 1946 deregistration was racially discriminatory. [Finding 4.] The decision of the California courts was that he had brought a stale claim. *Griffin v. International Longshoremen's and Warehousemen's Union* (1952), 109 Cal.App.2d 823. In this proceeding the Ninth Circuit has come to the same conclusion, the only difference being that some 20 more years have passed.

**Questions Presented.**

1. Whether under 42 U.S.C. §§1981 and 1985 the most nearly analogous state statute of limitations applies and, if so, whether the act of deregistration in 1946 may be ignored in assessing when such statute commenced to run.

2. Whether a litigant under Title VII of the Civil Rights Act of 1964 may bring suit although no charges have ever been filed with either the California agency having jurisdiction over employment discrimination matters or the EEOC.

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[3]The Petition states that Mr. Griffin and Mr. Keele did not sign the grievance (P-6), but they did participate in the proceedings. [Finding 8.]

## REASONS FOR DENYING THE WRIT.

### The Decision Below Is Not in Conflict With Prior Decision of Any Court.

#### A. The Period of Limitations for Conduct Within the Scope of the Civil Rights Act of 1866 Has Always Been the Most Nearly Applicable State Statute of Limitations.

The Ninth Circuit held in this case that any of several California statutes prescribing four years as a period of limitations could be used with respect to the Petitioners' claims under 42 U.S.C. §1981 and affirmed the dismissal on that basis. The Petition for Certiorari asserts two primary contentions against this statute of limitations holding. The first is that the 14th Amendment in some fashion prohibits the application of a state statute of limitations to the provisions of 42 U.S.C. §1981. The second contention is that even if a statute of limitations is applicable, the Respondents should be estopped from pleading it because it was not ascertainable until 1966-1971 that the 1946 deregistration would have certain seniority consequences with respect to vacations and pensions.

As to the first argument the Petition offers no case authority whatsoever and, indeed, conspicuously fails to mention the long line of cases which have held that where a Congressional enactment is silent as to any period of limitations, the general policy is that the most nearly analogous state period of limitations applies. See, *e.g.*, *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97; *United Automobile Workers v. Hoosier Cardinal Corp.* (1966), 383 U.S. 696; *Campbell v. Haverhill* (1895), 155 U.S. 610. The Petitioners' brief also fails to mention that every circuit court which has considered the question of whether §1981 has a

period of limitations has also concluded that the analogous state statute of limitations governs. *Green v. McDonnell-Douglas Corp.* (8th Cir. 1972), 463 F.2d 337, *modified on other grounds*, .... U. S. ...., 36 L.Ed.2d 668 (1973) (5-year state statute governing employment contracts applicable to discriminatory layoff claim); *Young v. International Tel. & Tel. Co.* (3d Cir. 1971), 438 F.2d 757, 763; *Boudreaux v. Baton Rouge Marine Co.* (5th Cir. 1971), 437 F.2d 1011 (governing statute of limitations was either 10-year Lousiana state governing contracts or, if back wages claimed, one-year statute applicable to the recovery of workmen's wages); *Waters v. Wisconsin Steel Works* (7th Cir. 1970), 427 F.2d 476, *cert. den.*, 400 U.S. 911 (5-year statute governing civil action not otherwise provided for). See also *Page v. Curtis-Wright Corp.* (D.N.J. 1971), 332 F.Supp. 1060 (6-year statute governing breach of contract action).

Thus not only is there no conflict in judicial decisions on this point, but also the authority in support of the Ninth Circuit's holding in this case is so abundant that the issue deserves the mantle of being considered "well-settled". The only "rebuttal" Petitioners attempt to offer is a somewhat ambiguous reference to *Holmberg v. Armbrecht* (1945), 327 U.S. 392. That case acknowledged that the general rule is to follow a state statute of limitations where a Congressional statute is silent on the period of limitations, but then also held that where the action was wholly "equitable" no statute of limitations was applicable. The citation of this case is confusing because Petitioners do not make the argument that §1981 creates an equitable action. However, to the extent such an argument is implied, it is clear from the above-cited cases that §1981 is not governed

by the *Holmberg* rule. See also *United States v. Georgia Power Co.* (5th Cir. 1973), 474 F.2d 906, 923. Moreover this Court itself has held that with respect to a related 1866 Civil Rights Act statute, 42 U.S.C. §1983, the appropriate state statute of limitations applies. *O'Sullivan v. Felix* (1914) 233 U.S. 318.[4]

As to the second contention that the statute of limitations did not begin to run until sometime in the 1966-71 period, Petitioners' brief was equally devoid of any legislative, textual or judicial authority. As the Ninth Circuit found, "the perceivable effects of the alleged wrong were substantial at the outset." (A-2.) They were so perceivable that one of the Petitioners brought suit in 1948 in state court raising the same issue present here and both Petitioners participated in grievance-arbitration proceedings commenced in 1965 claiming that under the *1961-1965* collective bargaining agreement they were being wrongfully denied seniority credit.

Moreover, as the District Court found, there was actual knowledge as of 1958 that the loss of credit arising from the 1946 deregistration was affecting the amount of earned vacation.[5] Under such circumstances the Ninth Circuit correctly rejected any notion of there being continuing discrimination preventing the period of limitations from ever running. Certainly a layoff by itself is not such a continuing act (See *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109,

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[4]Numerous circuit court cases since the *O'Sullivan* case have held to the same effect. See, *e.g. Marnin v. Zampella* (3d Cir. 1972), 456 F.2d 1097, *cert. den.*, 406 U.S. 960.

[5]Thus the Petitioners' assertion on pages 12-14 of their Petition that the effects were not ascertainable until 1966 or thereafter is incorrect.

1211 (1971); *Kennedy v. Wheeling Pittsburgh Steel Corp.* (4th Cir. 1972), .... F.2d ...., 81 RRM 2349)[6] and, in any event, the only way Petitioners could successfully maintain the suit would be to prove that the stale events of 1946 were motivated by racial considerations. Such a reexamination of stale events, however, is precisely why statutes of limitations are enacted and Petitioners have totally failed to provide any reason why this Court should grant *certiorari* in order to possibly create a novel exception to the important policies served by statutes of limitations.

**B. The Title VII Claim Was Properly Dismissed as None of the Statutory Prerequisites Were Followed.**

One of the jurisdictional bases relied upon by Petitioners was Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* That Act provides that a claimant may sue in District Court only after a charge has been filed with the EEOC and, if the act occurs in a state which has an agency authorized to seek relief on behalf of such a claimant, such charge must also be referred to the state agency. 42 U.S.C. §2000e-5. California has such an agency. Cal.Lab.Code §1410 *et seq.*

Despite this clear statutory command, Petitioners never filed charges with the California state agency or the EEOC. The excuse proffered is that had they filed

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[6]The *Kennedy* case involved a claim that an employer had violated a collective bargaining agreement by laying off plaintiffs and not transferring the plaintiffs promptly enough, thereby leading to a loss of seniority credit. The layoff occurred in 1963 but suit was not brought until 1971. The court held that the suit was barred by West Virginia's five-year statute of limitations pertaining to oral contracts and further held that a denial of seniority credit is not a continuing violation, as the cause of action accrued at the time of the layoff.

with the EEOC they would have been met with an exhaustion of administrative remedies argument since a grievance-arbitration procedure was available, and if they pursued administrative relief the 90-day[7] period of limitations contained in Title VII would have run.

However, as both the Ninth Circuit and the District Court found, the horns of the legal dilemma which Petitioners have asserted was self-created. Petitioners cite no cases to substantiate the proposition that any charge filed with the EEOC would not have been processed because of a failure-to-exhaust-grievance-arbitration-remedies argument, because there are none. The EEOC and the courts have not held that Title VII remedies must await the workings of a grievance procedure. Indeed, the law is all to contrary. All the courts that have considered the question have held that Title VII claimants may simultaneously pursue both their Title VII remedies and their collective bargaining remedies, at least up to the point where there will be a final decision in one forum. See, *e.g., Newman v. Avco* (5th Cir. 1971), 451 F.2d 743; *Bowe v. Colgate-Palmolive Co.* (7th Cir. 1969), 416 F.2d 711.

The only case citation provided by Petitioners in connection with their argument on this point is *Love v. Pullman Co.* (1972), 404 U.S. 522. However, the citation is a particularly ill-chosen one, since the first sentence of the Court's opinion makes it clear that a Title VII claimant may *not* maintain suit unless certain administrative requirements are pursued. Thus the Petition has neither established that there are decisions of other circuits or this Court in conflict with the Ninth

[7]The Petitioners' reference to a 90-day period of limitations is erroneous. The limitations period applicable at that time to this case was 210 days.

Circuit's decision, nor that the question is of any substance to warrant being addressed by this Court again. It is therefore submitted that the case is not worthy of further consideration and that this court need not, and should not, review the Ninth Circuit's decision.

**Conclusion.**

For the reasons stated above, Respondent PMA urges the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: August 17, 1973.

Respectfully submitted,

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## APPENDIX A.

**Opinion of the Court of Appeals for the Ninth Circuit.**

United States Court of Appeals, for the Ninth Circuit.

Ralph Griffin and Robert E. Keele, Appellants, vs. Pacific Maritime Association and Local 13, International Longshoremen's and Warehousemen's Union, Appellees. No. 72-2117.

[April 25, 1973]

Appeal from the United States District Court for the Central District of California.

Before: MERRILL, ELY, AND WRIGHT, Circuit Judges.

PER CURIAM:

A group of longshoremen appeal from an order granting summary judgment in favor of their union and certain employers.

The longshoremen complain that in 1946, they were "deregistered" by the union and prevented from pursuing their trade until, several years later, they were allowed to reregister. They alleged that the 1946 layoff was racially motivated and contend that the blacks and Mexican-Americans who were deregistered are entitled to receive credit (towards seniority and vacation, automation and pension pay) for the periods during which they did not work, 1946 to 1948-51.

On multiple grounds the District Court held that it was not required to reach the merits of the claim. We agree with the District Court that the action was barred by reason of the passage of time and the appellants' failure to exhaust another remedy. We make no judg-

ment on the merits of the claim. Nor do we announce an opinion as to the correctness of the other grounds upon which the District Court rested its decisions.

The longshoremen alleged jurisdiction by reason of both the 1866 Civil Rights Act (42 U.S.C. §§ 1981, 1985) and the 1964 Civil Rights Act (42 U.S.C. § 2000-e).

*The 1866 Act*

The pertinent provisions of the 1866 Civil Rights Act prescribe no period of limitations; hence, the most nearly analogous state period of limitations applies. *See, e.g., United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 763 (3d Cir. 1971).

The most nearly applicable California statutes prescribe limitation periods not exceeding four years. *See* Cal. Code Civ. Pro. §§ 337, 338(1) West 1972 Supp.) & 343 (West 1954). If any one of these statutes governs the longshoremen's § 1981 and § 1985 actions, the filing of the complaint was decidedly tardy.

The longshoremen advance two reasons why the statute of limitations should not be held to have commenced to run from 1946 or thereabouts.[1] First, they argue that the pension and fringe benefits were not fully ascertainable until sometime later, and they contend that their cause of action resides in their 1966-71 contract. We recognize that there may be cases in which a legal wrong has no significantly compensable consequences until the occurrence of a subsequent event. But we need not now decide whether, in such in-

[1]The suggestion that appellees were estopped from asserting the statute of limitations as a defense has no merit whatsoever.

stances, the period of limitations should be considered to commence from the date of that event. Here, the perceivable effects of the alleged wrong were substantial at the outset. In 1948, one of the appellants in this case instituted suit in the California courts, seeking to regain union membership and employment. That suit presented the precise central issue that is now presented here and was decided adversely to the appellant Griffin. *Griffin v. International Longshoremen's and Warehousemen's Union,* 109 Cal. App. 2d 823 (1952). And, in 1965, 33 longshoremen filed a grievance based on their 1946 deregistration and unsuccessfully resorted to arbitration.

Second, the appealing longshoremen contend that by refusing to credit them with the years lost after 1946, appellees are now committing a discriminatory act. We are not unmindful of certain cases wherein the theory of continuing discrimination has been upheld. *See, e.g., Love v. Pullman Co.,* 404 U.S. 522, 524 n.3 (1972); *Cox v. United States Gypsum Co.,* 409 F.2d 289 (7th Cir. 1969). A layoff, by itself, however, is not such a continuing act. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1211 (1971). Furthermore, in the present case, the only manner in which the appellants could have possibly established their claim was by evidence as to what motivated the 1946 act of deregistration and the subsequent, although short-lived, refusal to allow registration.[2] In

[2]On the face of it, denial of fringe benefits under the 1966-71 contract is a racially neutral act. At least half of the longshoremen deregistered in 1946 were Caucasian, and all had lower seniority than those not deregistered. There is no claim that the deregistered men have been the victims of discrimination since their reregistration, except inasmuch as they lost their years outside the union.

these circumstances, the District Court properly held that the claims under 42 U.S.C. §§ 1981 and 1985 were barred by reason of the lengthy lapse of time.

*The 1964 Act*

Unlike the 1866 Act, Title VII of the 1964 Civil Rights Act contains provisions that effectively operate to create a limitations period. An aggrieved party may sue in the District Court only if he has first filed charges with the Equal Employment Opportunity Commission (EEOC) within 90 days from the occurrence of the alleged violation, and the suit must be filed within thirty days from receipt of a notice of failure of conciliation from the EEOC. 42 U.S.C. § 2000e-5(a)&(d).

When a state has prohibited the unlawful practice alleged and has provided an agency "to grant or seek relief," additional administrative recourse is a prerequisite to private suit. The state agency must be notified, and the charge with the EEOC must be filed no later than thirty days after the state investigation is completed.[3] 42 U.S.C. § 2000e-5(b)&(d). *See Love v. Pullman, supra.*

California has established the remedies contemplated in § 2000c-5(b). *See* California Fair Employment Practice Act, Cal. Labor Code §§ 1410 et seq. (West 1971).

The appellants have never filed charges with the state agency or with the federal commission. They explain their failure to have done so on the theory that exhaustion of these remedies would have been futile

[3]Title VII does not specify how long a person may delay the filing of charges with the state agency. In California, one is allowed a period of one year from the occurrence of the allegedly unlawful act within which to file his claim with the state commission. Cal. Labor Code § 1422 (West 1971).

because these agencies would merely have required them to seek arbitration. In advancing this argument, the appellants misconceive the role of the EEOC.[4] Moreover, even after their unsuccessful recourse to arbitration, the longshoremen did not pursue the administrative remedies specified in Title VII.[5] Having failed to comply with the requirements of 42 U.S.C. § 2000e-5(a)&(b), the appellants may not, at this late date, maintain action under the Civil Rights Act of 1964.

AFFIRMED.

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[4]There is no jurisdictional bar to invoking Title VII remedies and the arbitration process independently. *See Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311-14 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714-15 (7th Cir. 1969). *But see Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972). And our court has held that there is no requirement that *all* conceivable state remedies be exhausted prior to the institution of a Title VII suit. *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028, 1031 (9th Cir. 1970).

[5]*Cf. Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970).

## APPENDIX B.

**Findings of Facts and Conclusions of Law of the United States District Court, Central District of California.**

United States District Court, Central District of California.

Ralph Griffin, et al., Plaintiffs, v. Pacific Maritime Association and Local 13, International Longshoremen's and Warehousemen's Union, an Unincorporated Association, Defendants. Civil Action No. 71-2188-JWC.

Filed April 6, 1972.

The motions for summary judgment by defendants, PACIFIC MARITIME ASSOCIATION, (hereafter referred to as PMA) and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 13 came on regularly for hearing and was heard on March 27, 1972. The Court, upon consideration of the pleadings, affidavits, points and authorities, depositions, and the entire record in the case makes the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. Plaintiffs Ralph Griffin and Robert Keele were employed as longshoremen in the Los Angeles-Long Beach area from 1944 to 1946. They along with approximately 500 other "limited registered" men were deregistered in April, 1946 and thus lost the right to any priority in dispatch to such jobs. As a result they did not work steadily as longshoremen until they were reregistered. Most of the men were reregistered in the 1948 to 1951 period and came back to work. Robert Keele was reregistered in 1950. Ralph Griffin, although

offered reregistration in 1949, did not commence work as a longshoreman again until 1963.

2. Plaintiffs are black and claim that the action in 1946 was motivated by racial considerations, although approximately half the men who had their employment terminated then were white. Plaintiffs have brought suit on behalf of only 25 or so specific black and Mexican-American men who were affected by the action that occurred in 1946.

3. Defendant Local 13 has been the collective bargaining representative of plaintiffs since 1944 and plaintiffs have been members of Local 13 for the periods in which they actually worked as longshoremen. Defendant PMA has no voice in or influence over the selection of members into Local 13. Defendant PMA, a multi-employer association of employers in the maritime industry responsible for the administration of labor-management relations, or its predecessors, have had collective bargaining agreements with the International Longshoremen's and Warehousemen's Union applicable to the longshore work performed by plaintiffs during this entire period of time. In 1946 and to date such collective bargaining agreements have contained clauses prohibiting racial discrimination.

4. Ralph Griffin and a number of others who are part of the alleged class commenced litigation in 1948 against Local 13 seeking to regain membership and employment. Said suit was eventually dismissed in 1952 by the California District Court of Appeal on the grounds of laches and the statute of limitations. The claim in that suit was in all material respects the same as the central claim in the instant lawsuit.

5. The collective bargaining agreements with PMA first provided for three weeks of vacation in 1954.

The requirement for years of service was then 12 years. In 1958 this requirement was dropped to 10 years and a fourth week of vacation was added for those longshoremen with 25 years of work. In 1962 this requirement of 25 years was lowered to 20 years. As with vacation benefits, pension benefits and "automation pay" have also been dependent on a specified number of years of work as a longshoreman.

6. Plaintiffs, along with other longshoremen deregistered in 1946, both white and black, have not been given credit for the period in which they were deregistered (1946 to 1949-51). There has been no claim that any other period of time is involved and no evidence of any failure to give credit for years actually worked.

7. As of 1958 longshoremen who had been deregistered in 1946 had to know that they were not being credited with years they had not actually worked as longshoremen, since in that year a third week of vacation was granted to those longshoremen having worked 10 years. Plaintiff Robert Keele had actual knowledge at approximately that time that he was not receiving credit for the years 1946-1950.

8. In 1965 approximately 33 longshoremen on behalf of themselves and others similarly situated filed a grievance against the defendants claiming that they had been discriminated on account of their race in 1946 and demanding that they be credited with the years during which they had been deregistered. The plaintiffs here actively participated in the grievance and subsequent arbitrations.

9. The grievance was taken through a two step arbitration procedure and in each step the grievance

was denied. The final opinion and decision was rendered by Sam Kagel, Coast Arbitrator, who ruled on March 11, 1971, *inter alia,* that the grievance was barred by the extraordinarily long delay in asserting it and that no racial discrimination was proved since over half of the deregistrants were white and they had been treated no differently than the black deregistrants.

10. Plaintiffs have made no attempts to file charges with the California Fair Employment Practices Commission or the EEOC.

11. The following Conclusions of Law, insofar as they may be considered Findings of Fact, are also found by the Court to be true in all respects. From the foregoing facts the Court concludes that:

## CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action as it involves claims of violations of civil rights under 42 U.S.C. §§ 1981, 1982, 1985 and 2000e-2.

2. Under §§ 1981, 1982 and 1985 the statute of limitations is the appropriate state statute of limitations. In this case the longest appropriate state statute is the four year statute under Cal. Code Civ. Proc. § 337 applicable to contracts founded upon an instrument in writing.

3. Regardless of which California statute is the most appropriate period of limitations the complaint here is barred since the cause of action accrued in 1946 or more than 25 years before this complaint was filed. It was in 1946 that the plaintiffs were deregistered, and thus, in essence, terminated, and all consequences to plaintiffs have stemmed from that action. Even assuming another cause of action accrued

when plaintiffs were denied credit for fringe benefit purposes under their collective bargaining contract, the complaint is still barred since such a cause of action would have accrued in 1958. The allegation in the complaint that "defendants" have continued to date to bar plaintiffs from union membership because of race does not prevent the applicability of the statute of limitations, since plaintiffs have controverted this allegation by admitting they have been Local 13 members since being reregistered and, in any event, it is uncontroverted that PMA has no role in selecting union members.

4. The claims of plaintiffs are also barred since they have previously been litigated in an arbitration proceeding with a decision adverse to their claims. By proceeding to a final arbitration award plaintiffs have been a binding election of remedies and are estopped from further proceedings. Furthermore this suit constitutes an improper attempt to collaterally attack an arbitration award. Plaintiffs have neither followed the mandate of 9 U.S.C. § 9-11, nor have they alleged wherein the arbitrator was without jurisdiction to render the award made.

5. The claim under Title VII must be dismissed since plaintiffs have not complied with the requirements of § 2000e-2 *et. seq.* by filing charges with the California Fair Employment Practices Commission or the EEOC. Absent such compliance the Court has no jurisdiction over Title VII allegations.

6. The claims under § 1981 and § 1985 are also barred because plaintiffs have neither pleaded nor provided any reasonable excuse for not attempting to proceed under Title VII. Such an excuse is necessary

in order to accommodate the requirements of Title VII with §§ 1981 and 1985. *Waters v. Wisconsin Steel Works* (7th Cir. 1970), 427 F.2d 476, *cert. den.*, 400 U.S. 911.

7. The Complaint does not state a cause of action under § 1982 as that statute is inapplicable to employment discrimination claims.

8. Plaintiff Ralph Griffin, along with other longshoremen who are parties to the prior litigation in the California courts are prevented by the doctrine of collateral estoppel from continuing with this action.

9. Since there are no genuine issues of material fact involving the Conclusions of Law set forth here, defendants PMA and Local 13 are entitled to summary judgment.

10. Any Conclusions of Law contained in the Findings of Fact are deemed incorporated herein by reference. Each of the above Conclusions of Law constitute an independent ground for awarding judgment to defendants.

DATED: April 6, 1972.

JESSE W. CURTIS
United States District Judge

FILE COPY

FILED
AUG 20 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
NO. 73-159

RALPH GRIFFIN and ROBERT E. KEELE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION and LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association,

Respondents.

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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## TOPICAL INDEX


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATUTES INVOLVED | 2 |
| CONCISE STATEMENT OF THE CASE | 5 |
| A. PROCEEDINGS BELOW | 5 |
| B. FACTUAL BACKGROUND | 6 |
| ARGUMENT | 8 |
| A. THERE IS NO CONSTITUTIONAL QUESTION | 9 |
| B. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR AMONG THE CIRCUITS | 15 |
| C. NO IMPORTANT ISSUE OF LAW EXISTS WHICH HAS NOT BEEN SETTLED | 17 |
| PRAYER | 20 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Chevron Oil Co. v. Huson, —U.S.—; 92 S. Ct. 349 (1971). . . . . | 13 |
| Cope v. Anderson, 331 U.S. 461; 67 S. Ct. 1340 (1947). . . . . | 11 |
| Ralph Griffin, et al vs. ILWU, Local 1-13, etc., et al, 109 Ca. App.2d 823; 241 Pac.2d 552 (1952). . . . . | 7 |
| Holmberg v. Armbrecht, 327 U.S. 392; 66 S. Ct. 582 (1946). . . 10, 12, 13, | 17 |
| International Harvester Co. v. Waters, 400 U.S. 911; 91 S. Ct. 137 (1970). | 15 |
| International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696; 86 S. Ct. 1107 (1966). . . . . 11, | 13 |
| Love v. Pullman, 404 U.S. 522; 92 S. Ct. 616 (1972) . . . . . | 17 |
| O'Sullivan v. Felix, 233 U.S. 318; 34 S. Ct. 597 (1914). . . . . | 13 |
| Russell v. Todd, 309 U.S. 280; 60 S. Ct. 527 (1940) . . . . . | 10 |
| Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) . . . . . | 15 |
| Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970). . . . | 15 |

| Statutes | Page |
|---|---|
| 28 U.S.C. Section 725 (1940 Ed.). . | 11 |
| 28 U.S.C. Section 1652 (1972 Ed.) | 11, 13 |
| 42 U.S.C. Section 1981 (1972 Ed.) . . . . . .3, 4, 9, | 13, 15 |
| 42 U.S.C. Section 1988 (1970 Ed.) .4, | 13 |
| 42 U.S.C. Sections 2000e1-15. . . . | 9 |
| 42 U.S.C. Section 2000e-5(d) (1970 Ed.). . . . . 2, 6, | 15 |
| California Code of Civil Procedure, Sections 337, 338(1) (West 1972 Supp.) and 343 (West 1954) . . . . . | 14 |

IN THE

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# RESPONDENT'S BRIEF
# IN OPPOSITION TO PETITION
# FOR WRIT OF CERTIORARI
# TO THE UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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Respondent LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION prays that the Petition for a Writ of Certiorari be denied.

## STATUTES INVOLVED

The law in effect at the time of this suit, Title VII of the Civil Rights Act of 1964, Section 706, 42 U.S.C., Section 2000e-5(d) (1970 Ed.), provides in pertinent part:

> "A charge (of discrimination based upon race) under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b)

> of this section (by application to State or local authorities), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

The "equal rights" provision, Section 16 of the Civil Rights Act of 1870, 42 U.S.C. 1981, provides in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right... to make and enforce contracts...and to the full and equal benefit of all laws and pro-

> ceedings for the security of...property ... ." (1972 Ed.)

The laws applicable to proceedings brought under 42 U.S.C. Section 1981 are set forth in 42 U.S.C. Section 1988 (1970) which provides as follows:

> "...(I)n all cases where...(the laws of the United States) are not adapted to the object (of vindicating the civil rights of all persons), or are deficient in the provisions necessary to furnish suitable remedies...the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil...cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ... ."

## CONCISE STATEMENT OF THE CASE

### A. PROCEEDINGS BELOW

On September 13, 1971, Petitioners filed suit in the United States District Court for the Central District of California requesting injunctive relief and damages. Petitioners alleged that the Respondents had engaged in a conspiracy since 1945 to deprive Petitioners of certain collective bargaining rights because of their race and requested an injunction and damages for fringe benefits lost because of an allegedly discriminatory discharge in 1946 and for punitive damages. Respondents PACIFIC MARITIME ASSOCIATION (hereinafter "PMA") and INTERNATIONAL LONGSHOREMEN'S AND

WAREHOUSEMEN'S UNION, LOCAL 13 (hereinafter "LOCAL 13") moved for summary judgment. The District Court heard the motion on March 27, 1972, and granted it, finding in favor of Respondents on all points raised (R. 120 et. seq.).

Petitioners appealed to the Ninth Circuit and after argument the Court ruled in favor of Respondents on the basis that the action was barred both by the passage of time and the Petitioners' failure to exhaust their remedies under 42 U.S.C. Section 2000e-5(d) (1970 Ed.).

## B. FACTUAL BACKGROUND

In 1946 Petitioners, as part of a group of about 500 men, were laid off because of their low seniority and

because of lack of work opportunities at that time. Of those 500, over half were white. By 1951 most of these men were again offered work.

Petitioners claim that the layoff was racially motivated and that they, along with those they represent, ought to be receiving credit for the period 1946 to 1948-51 (which they did not work) for vacation and pension purposes. No party contends that benefits based upon periods subsequent to reregistration have been denied. Furthermore, two prior attempts alleging the same discrimination were denied as being too late. Both a 1948-1952 law suit in State Court, Ralph Griffin, et al vs. ILWU, Local 1-13, etc., et al, 109 Cal. App.2d 823; 241 Pac.2d 552 (1952), and a grievance arbitration proceeding resulted in judgments and

awards against Plaintiffs on that ground.

## ARGUMENT

It is impossible to comprehend the grounds upon which Petitioners request certiorari before this Court. They have shown no conflict of the decision below with either prior decisions of this Court or with the decisions of the other Circuits. They do not intimate that the decisions of the Federal Courts below are in conflict with the applicable laws of the State of California. Nor do they proffer that there exists an important question of Federal law which is now undecided, but that should be decided by this Court. Finally, they do not claim that the Court of Appeal has departed

from or has sanctioned the departure from the accepted and usual course of judicial proceedings. Petitioners apparent contentions will be answered below.

A. THERE IS NO CONSTITUTIONAL QUESTION

Petitioners in this action brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e1-15 and under 42 U.S.C. Section 1981. Petitioners contend that it would be a denial of Fourteenth Amendment rights for a Federal Court to apply a State period of limitations in the vindication of federally protected rights guaranteed by 42 U.S.C. 1981 (1971 Ed.).

Although Section 1981 is not subject to an expressed period of limitation,

it is well settled that the State statute of limitation for the most closely analogous cause of action will apply.

There are few occasions when a Federal Court sitting in a Federal question case for which no applicable Federal statute of limitations exists will create a period of limitations as a matter of Federal common law. One such case was Holmberg v. Armbrecht, 327 U.S. 392; 66 S. Ct. 582 (1946).

In Holmberg, the Court dealt with a federally created right for which the sole remedy was in equity. In its decision that State statutes of limitation should not apply to such equitable rights and remedies, the Court relied upon Russell v. Todd, 309 U.S. 280; 60 S. Ct. 527 (1940). It should be noted that Russell stressed two things: first,

the importance of the Rules of Decision Act which at that time applied only to trials at common law 28 U.S.C. 725 (1940), and second, that where the jurisdiction of a Federal Court in equity was concurrent with that of law brought in aid of a legal right equity will withhold its remedy if the legal right is barred by the local statute of limitations. This is still the law. Cope v. Anderson, 331 U.S. 461; 67 S. Ct. 1340 (1947); International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696; 86 S. Ct. 1107 (1966).

It should be noted that the Rules of Decision Act was revised and clarified in the light of the Federal Rules of Civil Procedure, 28 U.S.C. 1652 (1972 Ed.). It now applies to all civil actions, including those which would have been brought in equity prior to the inception

of the Federal Rules of Civil Procedure.

Assuming, however, that Holmberg might still be applicable, it stands for the proposition that where fraud exists and the Plaintiff, with due care and diligence and without fault, cannot discover the fraud, his rights will not be extinguished. However, if it can be shown that his lack of diligence was wholly unexcused and both the nature of the claim and the situation of the parties was to call for diligence, a Federal Court in equity will dismiss the suit. Holmberg v. Armbrecht, supra.

In the present case, Petitioners suffered substantial injuries in 1946 by being deregistered, they waited until 1948 to sue the first time and over 20 years to commence action again. They have no excuse for so sleeping on their

injuries.

In contrast to Holmberg, claims arising under 42 U.S.C. Section 1981 clearly contemplates the application of State law where the laws of the United States have not spoken to the matter in question. 42 U.S.C. 1988 (1972 Ed.). The validity of the decision to apply the most nearly analogous State statute of limitations is correct by reason of not only 42 U.S.C. 1988, but also 28 U.S.C. Section 1652 and the numerous decisions of this Court. O'Sullivan v. Felix, 233 U.S. 318; 34 S. Ct. 597 (1914); International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696; 86 S. Ct. 1107 (1966); Chevron Oil Co. v. Huson, —U.S.—; 92 S. Ct. 349 (1971).

It is absurd to argue in the light of this well settled law that

application of the California Statute of Limitations, California Code of Civil Procedure, Sections 337, 338(1) (West 1972 Supp.) and 343 (West 1954), is constitutionally infirm.

Furthermore, it cannot be shown that there was any denial of due process of the law or of the equal protection of the laws by any State action. In fact, a statute of limitations is designed to protect against cases such as the present case where there is an attempt to litigate (in the present case, to relitigate) situations occurring in the distant past. In fact, the statute in question is racially neutral, both on its face and in its application.

Petitioners' first contention is without merit.

## B. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR AMONG THE CIRCUITS

Although there is division among the Circuits regarding the contention that one need not file charges with either the Equal Employment Opportunity Commission or the relevant State agency prior to filing suit under 42 U.S.C. Section 1981 (compare, for example, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), International Harvester Co. v. Waters, 400 U.S. 911; 91 S. Ct. 137 (1970) and Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) ), no Circuit Court has allowed a claimant to refrain from filing a complaint with the EEOC, as is required by 42 U.S.C. Section 2000e-5(d), and then

file suit under that Section in the Courts.

If Petitioners claim that the only actual discrimination occurred in 1946, then it is clear that suit under the Civil Rights Act of 1964 is frivolous, since its effective date was not until some years later. If Petitioners contend that the discrimination occurred at some later date, then in order to gain the jurisdiction of the Court to hear suit brought under Title VII of the Civil Rights Act of 1964, Petitioners must comply with provisions of the Civil Rights Act of 1964.

There are no cases of this Court or any of the Circuits which conflict regarding the necessity of filing of such a complaint as a prerequisite to such a suit. In Petitioners sole authority,

Love v. Pullman, 404 U.S. 522; 92 S. Ct. 616 (1972), Plaintiffs therein had filed a complaint with the EEOC.

## C. NO IMPORTANT ISSUE OF LAW EXISTS WHICH HAS NOT BEEN SETTLED

Petitioners seem to contend that a wrong perpetrated in 1946 has given rise to a cause of action in 1969.

Clearly if a cause of action exists, it exists when a party knew or should have known that a wrong had been committed. (See Holmberg v. Armbrecht, supra.) So if Petitioners' deregistration in 1946 was unlawful and Petitioners, through due diligence, knew they had been wronged, then a right to sue would have accrued at that time. In fact, Petitioners recognized the 1946 layoff as the

basic act of which they complained. Petitioners do not and have not contended Respondents concealed from them the injury they then received.

After the deregistration there were other adverse effects that resulted from the 1946 to 1948-51 period of unemployment; for example, in 1954 when 12 years of seniority was required to obtain a third week of vacation and in 1958 when this was reduced to 10 years of service. The injuries involved from not having worked clearly became known or should have become known by Petitioners in 1958.

To claim that the extent of injuries was greater than may have been originally contemplated does not give rise to a new cause of action at the time the extent of the injuries became apparent.

Since the purpose of statutes of limitation are designed to prevent the litigation of occurrences which have grown old, the litigation here should be barred. To cause the litigation of the central issue of this case, whether the 1946 deregistration or any of the other supposed acts which Petitioners knew or should have known about, is inconsistent with the purpose of such statutes of limitation.

## PRAYER

For the reasons set forth herein, LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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